

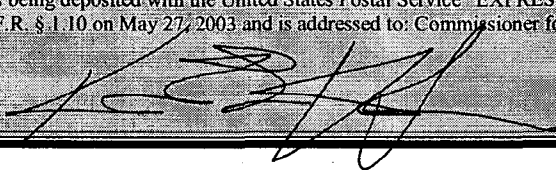
TTAB

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DATE OF DEPOSIT May 27, 2003

I hereby certify that this document is being deposited with the United States Postal Service "EXPRESS MAIL POST OFFICE TO ADDRESSEE" service under 37 C.F.R. § 1.10 on May 27, 2003 and is addressed to: Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3513.



**UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

Registration No.: 2,666,400
Mark: "K 326"
Registered: December 24, 2002



05-27-2003

U.S. Patent & TMO/TM Mail Rcpt Dt. #22

CROSS CREEK SEED, INC.

and

COATING SUPPLY, INC.,

Petitioners,

v.

F.W. RICKARD SEEDS, INC.,

Respondent.

Cancellation No. 92041792

**RESPONSE OF PETITIONERS CROSS CREEK SEED, INC. AND COATING
SUPPLY, INC. TO THE MOTION OF RESPONDENT F.W. RICKARD SEEDS
INC. TO SUSPEND PROCEEDINGS PENDING OUTCOME OF FEDERAL
COURT LITIGATION**

03 JUN 10 10 55 AM '03

Petitioners Cross Creek Seed, Inc ("Cross Creek") and Coating Supply, Inc. ("Coating Supply") (collectively, "Petitioners") hereby respond to the Motion of Respondent F.W. Rickard Seeds, Inc. ("Respondent") to Suspend Proceedings Pending Outcome of Federal Court Litigation (hereinafter, "Motion to Suspend"). In support of their response, Petitioners state as follows:

Argument

I. Respondent's Motion to Suspend Is Moot and Must Be Denied, Due to Petitioners' Meritorious Motion for Summary Judgment

1. Petitioners have filed a motion for summary judgment (hereinafter, "Summary Judgment Motion") to cancel Trademark Registration 2,666,400 (the "400 Registration"). Pursuant to Trademark Trial and Appeal Board ("Board") rules and practice, the Summary Judgment Motion should be decided before the Motion to Suspend. As Petitioners are entitled to summary judgment, the Motion to Suspend must be denied as moot.

2. Section 2.117(b) of title 37 of the Code of Federal Regulations provides that—

[w]henver there is pending, at the time when the question of the suspension of proceedings is raised, a motion which is potentially dispositive of the case, the motion may be decided before the question of suspension is considered.

The foregoing provision was adopted in 1983 to codify the Board's existing practice. *Notice of Final Rulemaking*, 48 Fed. Reg. 23,122, 23,129 (May 23, 1983) ("[s]ection 2.117(b) codifies existing practice as to determination of a potentially dispositive motion when the question of suspension of proceedings is raised").

3. For decades, existing Board practice has been to decide a dispositive motion before considering a motion to suspend, regardless of which motion was filed first. *See, e.g., General Motors Corp. v. Cadillac Club Fashions, Inc.*, 22 USPQ2d 1933, 1936-37 (TTAB 1992) (potentially dispositive rule 60(b) motion for relief from judgment decided before Board considered motion to suspend; rule 60(b) motion filed first); *Allegro High Fidelity, Inc. v. Zenith Radio Corp.*, 197 USPQ 550, 551 (TTAB 1977) ("it

is the policy of the Board . . . to determine any outstanding motions which may be dispositive of the case prior to consideration of the question of suspension”; motion to suspend filed first); *Continental Specialties Corp. v. Continental Connector Corp.*, 192 USPQ 449, 450 (TTAB 1976) (“[i]t is the Board’s practice to determine any motion that may be dispositive of the proceeding before us before acting on a motion to suspend”; unclear whether motion to dismiss or motion to suspend filed first); *Toro Co. v. Hardigg Industries, Inc.*, 187 USPQ 689, 690 & n. 8 (TTAB 1975) (“it is the practice of the Board, when presented with a motion to suspend, to determine any outstanding motion which may be dispositive of the case prior to consideration of the question of suspension”; unclear whether cross-motions for summary judgment or motion to suspend filed first), *rev’d on other grounds*, 549 F.2d 785, 193 USPQ 149 (C.C.P.A. 1977); *Argo & Co. v. Carpetsheen Mfg., Inc.*, 187 USPQ 366, 366-67 (TTAB 1975) (Board decided motion for summary judgment before considering motion to suspend; motion to suspend filed first); *Other Telephone Co. v. Connecticut Nat’l Telephone Co.*, 181 USPQ 779, 783 (TTAB) (“motion to suspend in the present action was ruled on after the Board had rendered its decision on applicant’s motion for summary judgment”; motion to suspend filed first), *pet. denied*, 181 USPQ 779 (Comm’r 1974).

4. Here, the Board should follow its usual practice and decide the Summary Judgment Motion before considering the Motion to Suspend. The Summary Judgment Motion is straightforward, seeks cancellation of a registration that never would have been allowed had the examining attorney been alert to the uncontestable fact that “K326” is a plant variety name, and should be granted. An impermissible mark registered due to

administrative error is best corrected administratively, and, as the Summary Judgment Motion is meritorious, the Motion to Suspend should be denied as moot.

II. Alternatively, the Motion to Suspend Should Be Denied Because One of the Petitioners Is Not a Party to the Federal Litigation on Which Respondent Relies in Contending for Suspension

5. Assuming without conceding that the Board may consider the Motion to Suspend without first addressing the Summary Judgment Motion, the Motion to Suspend should nevertheless be denied.

6. Clearly, the Board may exercise its discretion to suspend proceedings pursuant to 37 C.F.R. § 2.117(a) if the parties before it are also engaged in a civil action that may be dispositive of the case. However, suspension would be inappropriate in this instance because one of the two Petitioners herein, Coating Supply, is neither a party to, nor in privity with a party to, the federal district court case on which Respondent relies in contending for suspension.¹ That case does not and cannot bind Coating Supply. As such, Coating Supply would be deprived of a forum to decide its challenge to the '400 Registration, should the Board suspend proceedings.

7. In requesting suspension, Respondent conveniently neglects to address the effect suspension would have on Coating Supply's rights. In fact, the Motion to Suspend refers only to "Petitioner" and "Cross Creek." The Board's practice is to deny suspension when the parties in the civil suit are not the same as or in privity with those before it, and so should deny suspension here. *Compare Tokaido v. Honda Associates, Inc.*, 179 USPQ 861, 861 (TTAB 1973) (motion to suspend Board proceeding pending

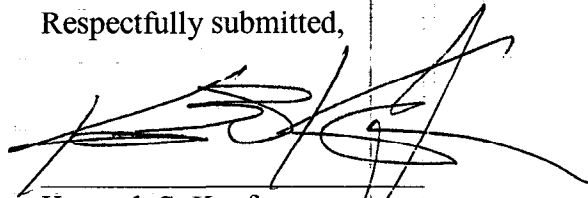
¹ Declaration of Josep Trias, ¶ 2 (setting forth facts demonstrating lack of privity between Coating Supply and Cross Creek). The referenced declaration is attached as Exhibit 1 to the Summary Judgment Motion.

final determination of a civil suit denied when civil suit involved respondent and a third party that was not in privity with petitioner), *with Argo & Co. v. Carpetsheen Mfg., Inc.*, 187 USPQ at 367 (motion to suspend granted when third party in civil suit was in privity with party in Board proceeding).²

Conclusion

For the foregoing reasons, the Board should deny the Motion to Suspend.

Respectfully submitted,



Kenneth S. Kaufman
Garson & Associates, LLC
7735 Old Georgetown Road, Suite 550
Bethesda, MD 20814
Telephone: 301/280-2700
Facsimile: 301/280-2707

Counsel for Petitioners
Cross Creek Seed, Inc. and
Coating Supply, Inc.

² The Board should also recognize that it possesses specialized knowledge and experience in trademark registration issues that could materially aid the federal court in deciding the civil suit between Respondent and Cross Creek, and that it should for that reason also deny the Motion to Suspend. *See, e.g., C-Cure Chemical Co v. Secure Adhesives Corp.*, 571 F. Supp. 808, 823, 220 USPQ 545, 557 (W.D.N.Y. 1983) (court stayed its case pending Board decision that would “materially aid” court proceeding, as Board was “better equipped than . . . the courts to make an initial determination as to trademark registration”); *Driving Force, Inc. v. Manpower, Inc.*, 498 F. Supp. 21, 25-26, 211 USPQ 60, 63-64 (E.D. Pa. 1980) (same).

CERTIFICATE OF SERVICE

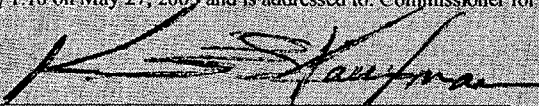
I hereby certify that I caused true and accurate copies of the foregoing Response of Petitioners Cross Creek Seed, Inc. and Coating Supply, Inc. to the Motion of Respondent F.W. Rickard Seeds, Inc. to Suspend Proceedings Pending Outcome of Federal Court Litigation, to be served by first-class mail, postage prepaid, this 27th day of May, 2003, upon the following:

Thomas L. Casagrande
Howrey Simon Arnold & White, LLP
750 Bering Drive
Houston, TX 77057

George B. Snyder
Kramer Levin Naftalis & Frankel LLP
919 Third Avenue
New York, NY 10022



Kenneth S. Kaufman

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UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

Registration No.: 2,666,400
Mark: "K 326"
Registered: December 24, 2002

CROSS CREEK SEED, INC.

and

COATING SUPPLY, INC.,

Petitioners,

v.

F.W. RICKARD SEEDS, INC.,

Respondent.

Cancellation No. 92041792

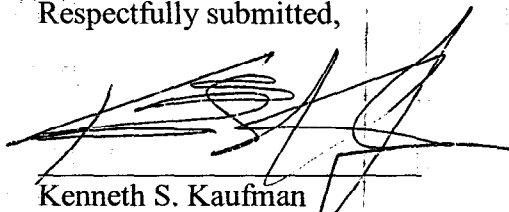
NOTICE OF CHANGE OF ADDRESS

PLEASE TAKE NOTICE that the address of Petitioners' counsel has changed.

The new address is:

Kenneth S. Kaufman
Garson & Associates, LLC
7735 Old Georgetown Road, Suite 550
Bethesda, MD 20814

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'KS Kaufman', written over a horizontal line.

Kenneth S. Kaufman
Garson & Associates, LLC
7735 Old Georgetown Road, Suite 550
Bethesda, MD 20814
Telephone: 301/280-2700
Facsimile: 301/280-2707

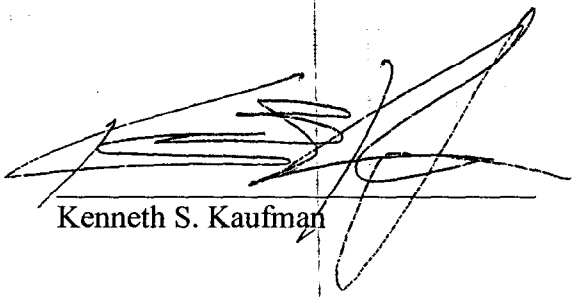
Counsel for Petitioners
Cross Creek Seed, Inc. and
Coating Supply, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I caused true and accurate copies of the foregoing Notice of Change of Address to be served by first-class mail, postage prepaid, this 27th day of May, 2003, upon the following:

Thomas L. Casagrande
Howrey Simon Arnold & White, LLP
750 Bering Drive
Houston, TX 77057

George B. Snyder
Kramer Levin Naftalis & Frankel LLP
919 Third Avenue
New York, NY 10022



Kenneth S. Kaufman

NUMBER ER 008001276 US

EXPRESS MAIL MAILING LABEL

DATE OF DEPOSIT May 27, 2003

I hereby certify that this document is being deposited with the United States Postal Service "EXPRESS MAIL POST OFFICE TO ADDRESSEE" service under 37 C.F.R. § 1.110 on May 27, 2003 and is addressed to: Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3513.

**UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

Registration No.: 2,666,400

Mark: "K 326"

Registered: December 24, 2002

CROSS CREEK SEED, INC.

and

COATING SUPPLY, INC.,

Petitioners,

v.

F.W. RICKARD SEEDS, INC.,

Respondent.

Cancellation No. 92041792

**MOTION OF PETITIONERS CROSS CREEK SEED, INC. AND COATING
SUPPLY, INC. FOR SUMMARY JUDGMENT AGAINST RESPONDENT F.W.
RICKARD SEEDS, INC.**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and section 528 of the Trademark Trial and Appeal Board Manual of Procedure, Petitioners Cross Creek Seed, Inc. ("Cross Creek") and Coating Supply, Inc. ("Coating Supply") (collectively, "Petitioners") hereby move for summary judgment against Respondent F.W. Rickard Seeds, Inc. ("Respondent"). In support of their motion, Petitioners state as follows:

Statement of Material Facts As to Which There Are No Genuine Issues

1. Petitioners instituted this cancellation proceeding on January 22, 2003, seeking to cancel Respondent's United States Trademark Registration No. 2,666,400 (the "400 Registration") for the mark "K 326."¹

2. "K326" is the name of a tobacco plant variety.² A variety name for a sexually-reproduced plant is chosen by the breeder of the variety pursuant to section 52 of the Plant Variety Protection Act ("PVPA"), 7 U.S.C. § 2422, and the PVPA's implementing regulations, 15 C.F.R. § 201.34(d).³ In this instance, the breeder dubbed a variety of *Nicotiana tabacum* that it had developed "K326," and applied for and received a plant variety protection certificate ("PVP certificate") from USDA. The certificate gave the breeder the right pursuant to section 111(a) of the PVPA, 7 U.S.C. § 2541(a), to exclude others from selling and propagating K326 for a term of years.⁴

3. Respondent admits that the PVP certificate for K326 tobacco was for 18 years, and that it was the owner of that certificate on March 26, 2002, when the certificate expired.⁵

¹ Petition to Cancel at 1.

² Declaration of Josep Trias, ¶ 3 and Exhibits A and B thereto (material from a United States Department of Agriculture ("USDA") website and from Respondent's website, identifying "K326" as a tobacco variety). The Declaration of Josep Trias is appended hereto as Exhibit 1.

³ USDA guidelines for naming plant varieties are also published on the Internet at www.ams.usda.gov/lsg/seed/varietyname.htm.

⁴ See PVP Certificate No. 8300070 for K326 and breeder's application therefor, which clearly identify "K326" as the name of the tobacco variety at issue. The foregoing documents are appended as a part of Exhibit A to Respondent's Motion to Suspend Proceedings Pending Outcome of Federal Court Litigation (hereinafter, "Motion to Suspend"), filed with the Trademark Trial and Appeal Board ("Board") on May 5, 2003.

⁵ Answer, ¶¶ 5-6.

4. Now that the PVP certificate for K326 has expired, Respondent seeks to assert trademark rights in the name of that tobacco variety through, *inter alia*, the '400 Registration.⁶

Petitioners Are Entitled to Judgment As a Matter of Law⁷

5. A PVP certificate functions much like a plant patent under the Plant Patent Act of 1930, 35 U.S.C. §§ 161-164. The difference is essentially one of applicability: a PVP certificate grants exclusive rights during its term with respect to a sexually-reproduced (i.e., via seed) or tuber-propagated plant variety, whereas a plant patent grants exclusive rights during its term with respect to a plant that propagates asexually (i.e., via cuttings, grafting, budding, rhizomes, corms, etc.), except for tuber-propagated plants. *See generally, J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124 (2001) (detailing purposes and history of PPA and PVPA in order to distinguish plant patents and PVP certificates from utility patents).

6. A variety name is used in a plant patent or PVP certificate to identify the variety, not its source, and therefore the variety name cannot function as a trademark. *Dixie Rose Nursery v. Coe*, 131 F.2d 446, 447, 55 USPQ 315, 316 (D.C. Cir 1942) (involving a plant patent), *cert. denied*, 318 U.S. 782, 57 USPQ 568(1943); Trademark Manual of Examining Procedure § 1202.12 *Varietal and Cultivar Names (Examination of*

⁶ See, e.g., Motion to Suspend, Exhibit C, ¶¶ 61(a), 64 (court pleading in which Respondent states that its "position is that, as a legal matter, [it] do[es] possess trademark rights in the designation 'K 326'").

⁷ Cases decided under Rule 56 are legion and the criteria for granting summary judgment are well known. Simply stated, the Board should grant summary judgment if it determines that there is no genuine issue as to any material fact and concludes that Petitioners are entitled to judgment as a matter of law. Fed R. Civ. Pro. 56(c); *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 (1986); *Nat'l Cable Television Ass'n v. American Cinema Editors, Inc.*, 937 F.2d 1572, 1576, 19 USPQ2d 1424, 1427 (Fed. Cir. 1991).

Applications for Seed and Plants) (3d ed. 2002) (collecting cases). As the Board has previously stated: "There is no question that variety names are generic designations and cannot be registered as trademarks." *In re Delta and Pine Land Co.*, 26 USPQ2d 1157, 1159 n. 4 (TTAB 1993).

7. Respondent has attempted to maintain exclusive control over the K326 variety of tobacco—despite expiration of the PVP certificate under which it had the right to exercise such control—through the improper assertion of trademark rights in the generic name "K 326," including obtaining the '400 Registration, even though it is against public policy for any one entity to retain such exclusivity after certificate expiration. *Dixie Rose Nursery*, 131 F.2d at 447, 55 USPQ at 316.

8. Furthermore, Petitioners and others that grow and market K326 are required by section 201 of the Federal Seed Act ("FSA"), 7 U.S.C. § 1571, to use the name "K326" in labeling and advertising tobacco seed of that variety.⁸ In fact, on

⁸ Section 201 states in relevant part that:

It shall be unlawful for any person to transport or deliver for transportation in interstate commerce—

(a) Any agricultural seeds . . . unless each container bears a label giving the following information . . . (1) The name of the kind or kind and variety for each agricultural seed component present in excess of 5 per centum of the whole and the percentage by weight of each: *Provided, That (A) . . . if any such component is one which the Secretary of Agriculture has determined . . . is generally labeled as to variety, the label shall bear, in addition to the name of the kind, either the name of such variety or the statement "Variety Not Stated". . . .*

(cont'd)

November 25, 2002, USDA issued a warning letter to an affiliate of Respondent, Gold Leaf Seed Company ("Gold Leaf"), stating that Gold Leaf's assertion of exclusive rights in the varietal name "K326" violated the FSA, and that the FSA requires all parties that grow or market the "K326" variety of tobacco seed to use that name in labeling and advertising.⁹

9. Allowing registration of a variety name such as that at issue here needlessly creates a statutory conflict, as Petitioners must label and market their seed in such a manner that they subject themselves to claims of infringement, strengthened by the imprimatur of trademark registration, when they abide by the FSA. Considerations of sound public policy require instead that plant variety names remain in the public domain.

Conclusion

Given that "K326" is the generic name of a tobacco plant variety, "K 326" does not and cannot function as a trademark. There is no genuine issue of material fact and Petitioners are entitled to judgment as a matter of law. Accordingly, the Board should cancel the '400 Registration.

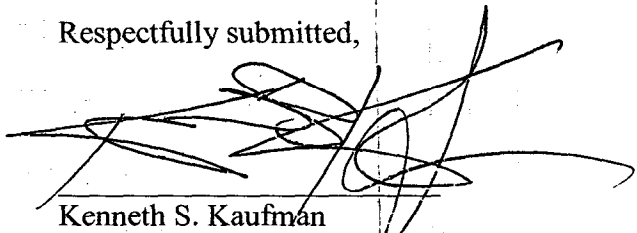
(footnote cont'd)

(d) Any agricultural seeds . . . pertaining to which there has been a false advertisement, or to sell or offer for sale such seed for interstate shipment by himself or others. . . .

(Emphasis added.) The Secretary of Agriculture has determined that tobacco seed is generally labeled as to variety. 7 C.F.R. § 201.10(a). Consequently, labeling and advertising of K326 tobacco seed must identify the seed as "K326"—unless it is labeled with the statement "Variety Not Stated"—hardly a stellar recommendation likely to induce sales.

⁹ Declaration of Sam C. Baker, ¶ 3 and Exhibit A thereto (USDA's November 25, 2002 letter). The Declaration of Sam C. Baker is appended hereto as Exhibit 2. Respondent was copied on USDA's November 25, 2002 letter. *Id.*, ¶ 4; Answer, ¶ 8.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Kenneth S. Kaufman', written over a horizontal line.

Kenneth S. Kaufman
Garson & Associates, LLC
7735 Old Georgetown Road, Suite 550
Bethesda, MD 20814
Telephone: 301/280-2700
Facsimile: 301/280-2707

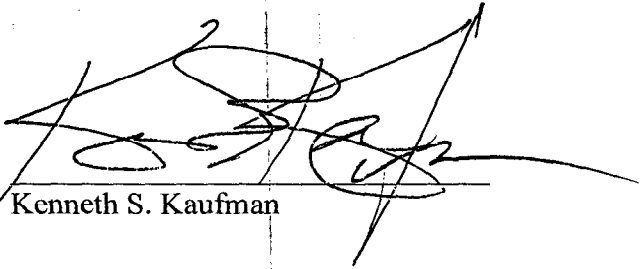
Counsel for Petitioners
Cross Creek Seed, Inc. and
Coating Supply, Inc.

CERTIFICATE OF SERVICE

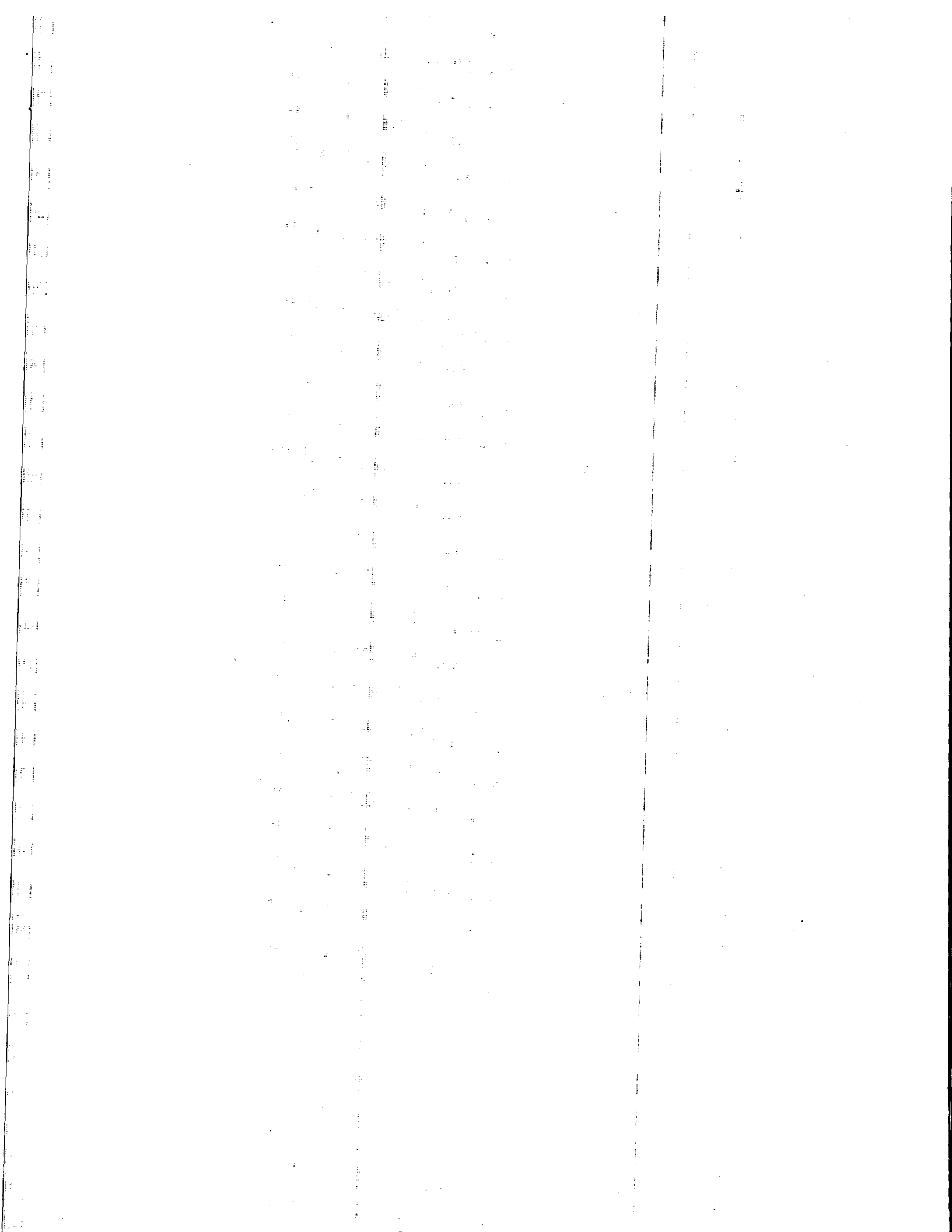
I hereby certify that I caused true and accurate copies of the foregoing Motion of Petitioners Cross Creek Seed, Inc. and Coating Supply, Inc. for Summary Judgment Against Respondent F.W. Rickard Seeds, Inc., together with the Declarations of Josep Trias and Sam Baker, to be served by first-class mail, postage prepaid, this 27th day of May, 2003, upon the following:

Thomas L. Casagrande
Howrey Simon Arnold & White, LLP
750 Bering Drive
Houston, TX 77057

George B. Snyder
Kramer Levin Naftalis & Frankel LLP
919 Third Avenue
New York, NY 10022



Kenneth S. Kaufman



**UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

Registration No.: 2,666,400
Mark: "K 326"
Registered: December 24, 2002

CROSS CREEK SEED, INC.

and

COATING SUPPLY, INC.,

Petitioners,

v.

F.W. RICKARD SEEDS, INC.,

Respondent.

Cancellation No. 92041792

DECLARATION OF JOSEP TRIAS

I, JOSEP TRIAS, do hereby depose and state as follows:

1. I am now, and at all times relevant hereto have been, the President of Petitioner Coating Supply, Inc. ("Coating Supply"), and am competent to testify to the matters addressed herein.
2. Coating Supply and Petitioner Cross Creek Seed, Inc. ("Cross Creek") (collectively, "Petitioners") are in the business of, *inter alia*, propagating, processing and marketing seed, including tobacco seed. Petitioners do not have any officers, directors or shareholders in common. Cross Creek is a nonexclusive licensee of certain technology that Coating Supply provides to Cross Creek.
3. Petitioners filed their Petition to Cancel Respondent's Registration No. 2,666,400 for the mark "K 326" (the "400 Registration") because "K326" is the name of

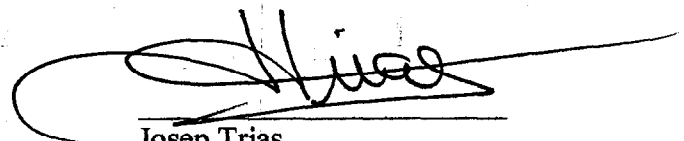
a variety of tobacco. *See, e.g.*, plant variety protection certificate information for K326, contained on the National Plant Germplasm System website (www.ars-grin.gov/npgs) maintained by the Agricultural Research Service of the United States Department of Agriculture ("USDA"). I have appended a true copy of the referenced material as Exhibit A hereto. *See also* the website of Respondent F.W. Rickard Seeds, Inc. (www.rickardseed.com), which identifies K326 as the name of a tobacco variety. I have appended a true copy of material from that website as Exhibit B hereto.

4. The K326 variety of tobacco represents approximately 25% of the flue-cured tobacco acreage in the United States. Cross Creek and Coating Supply are now and will in the future be damaged by the '400 Registration for "K 326." Pursuant to section 201 of the Federal Seed Act, 7 U.S.C. § 1571, and USDA's regulations at 15 C.F.R. §§ 201.10(a) and 201.34d, Cross Creek and Coating Supply are essentially required to use the name "K326" in order to identify the K326 varietal as such in their product labeling and advertising. Cross Creek and Coating Supply, as well as all other entities engaged in propagating, processing and marketing K326, will likewise suffer economic harm if they are forced by the chilling effect of the '400 Registration to refrain from engaging in such business.

5. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

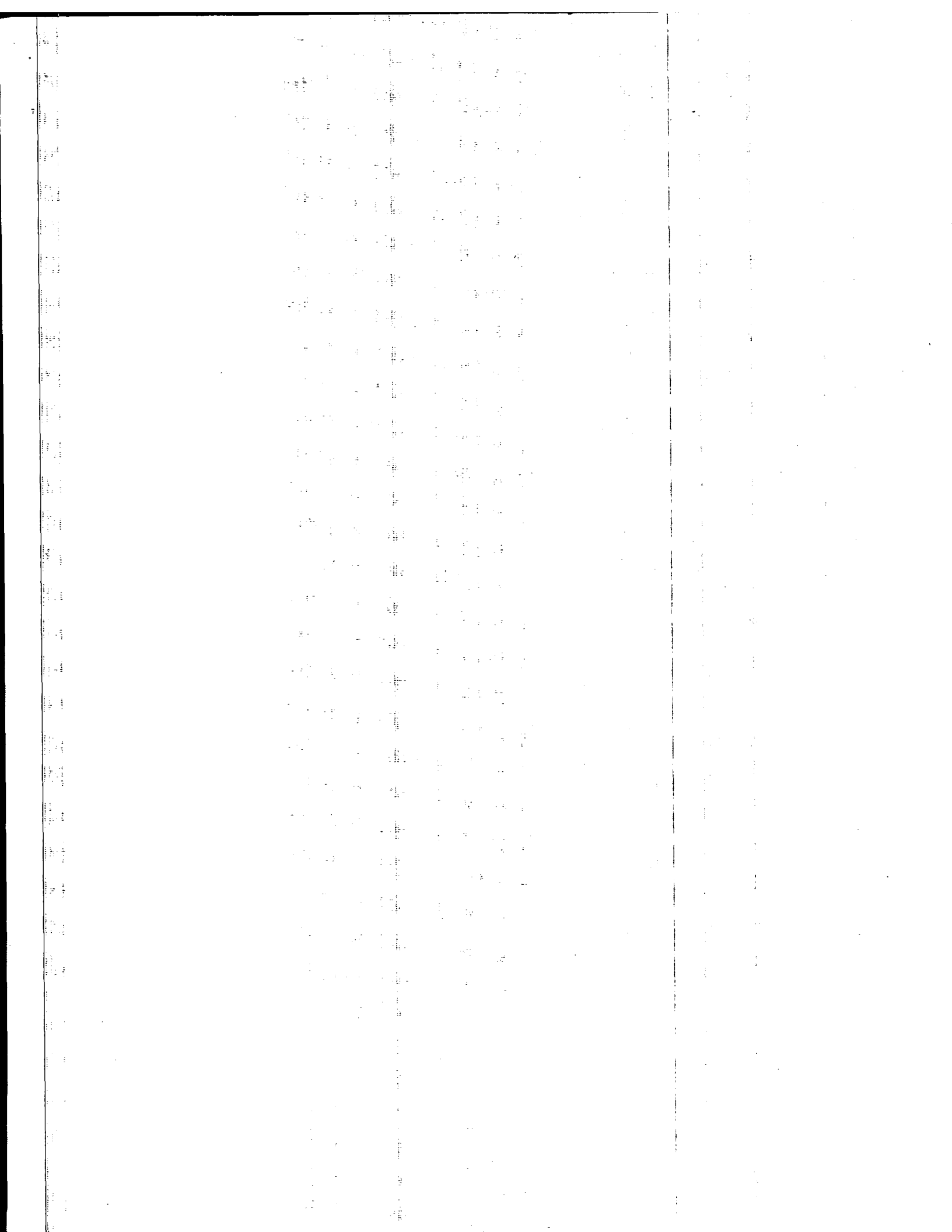
Further declarant sayeth not.

Executed on May 21, 2003



Josep Trias

V:\cccs\lttabcancel\pleadings\triasdeclaration



Plant Variety Protection Number: 8300070

Variety: K326

Taxon: Nicotiana tabacum L.

Crop: Tobacco

Applicant: Novartis Seeds, Inc.

Date filed: 02/25/1983

Status: Certificate Expired

Status date: 03/26/2002

Date issued: 03/26/1984

Years protected: 18

Number of pages: 11

Certified Seed Only - To be sold by variety name only as a class of certified seed.

Show GRIN Data

Plant Variety Protection Office
USDA-AMS, Beltsville, MD
Home Page

USDA - ARS - GRIN

PI 552505

Nicotiana tabacum L. SOLANACEAE

Cultivar name: K326.

Maintained by the Tobacco Collection. NPGS received: 1983. Inventory volume: 200. Life form: Annual. Improvement status: Cultivar. Form received: Seed. Accession backed up at second site.

Accession names and identifiers

K326

Type: Cultivar.

TC 319

Type: Inventory.

Intellectual Property Rights

U.S. Plant Variety Protection

PVP 8300070 Crop: TOBACCO. Date issued: 26-Mar-1984. Current status

Availability

Material is available for distribution. The normal amount distributed is 1000 seeds.

Source History

- Type: Developed. From: United States.
Cooperators:
1. Northrup, King & Company.
- Type: Donated. Date: 1983. From: United States.
Cooperators:
1. Northrup, King & Company.

| [USDA](#) | [ARS](#) | [GRIN](#) | [NPGS](#) | [New Search](#) |

Cite as: USDA, ARS, National Genetic Resources Program. *Germplasm Resources Information Network - (GRIN)*. [Online Database] National Germplasm Resources Laboratory, Beltsville, Maryland. Available: <http://www.ars-grin.gov/cgi-bin/npgs/html/achtml.pl?1447477> (20 May 2003)

Please send comments to the Database Management Unit at: dbmu@ars-grin.gov

[illegible]

Flue-Cured Tobacco Varieties

Gold Leaf Seed Co. is the exclusive distributor of Rickard Seeds flue-cured varieties in the United States. Call 1800-281-2541 for the Dealer nearest you, or [click here to visit Gold Leaf's website](http://www.RickardSeed.com).

Outside the United States, please contact F.W. Rickard Seeds, Inc.

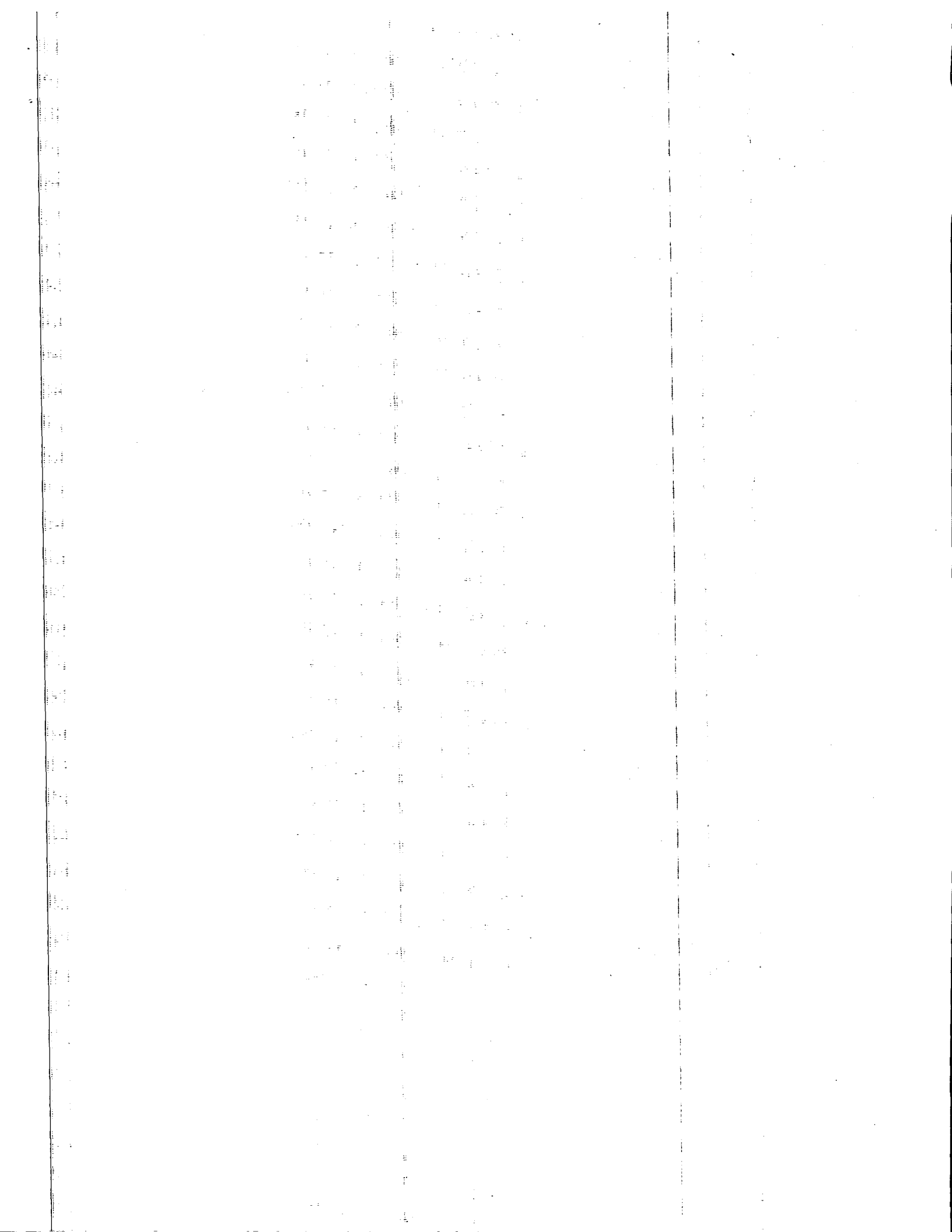
F.W. Rickards Seeds, Inc. continues to provide agronomic information and support for its varieties to all customers. Please contact us if you have questions.

Codes	H=High Resistance M=Moderate Resistance L=Low Resistance R=Resistant S=Susceptible							
	Variety	Maturity	Holding Ability	Curability	Black Shank	Bacterial Wilt	Root Knot Nematode	Tobacco Mosaic Virus
<u>Coker 371 Gold</u>	Early	Good/Fair	Excellent	H	M	S	S	S
<u>K 149</u>	Late	Good/Fair	Excellent	M	H	R	S	S
<u>K 326</u>	Late	Excellent	Excellent	L	L	R	S	S
<u>K 346</u>	Late	Exc/Good	Good	H	H	R	S	S
<u>K 358</u>	Medium	Excellent	Excellent	M	M	R	S	S
<u>K 394</u>	Medium	Fair	Fair	H	L	S	S	S
<u>K 399</u>	Medium	Good/Fair	Good	H	H	R	S	S
<u>K 730</u>	Medium	Good	Excellent	L	H	R	S	S
<u>NC 71</u>	Late	Exc/Good	Exc/Good	H	M	R	S	S
<u>NC 72</u>	Medium/Late	Excellent	Exc/Good	H	L	R	S	S
<u>NC 100</u>	Medium/Late	not rated	Excellent	L	L	R	R	R
<u>PVH03</u>	Medium	Exc/Good	Exc/Good	L	M	R	R	S
<u>PVH09</u>	Medium	not rated	Exc/Good	L	M	R	R	S
<u>PVH19</u>	Early	not rated	Excellent	S	L	R	R	R
<u>PVH50</u>	Medium	not rated	Exc/Good	L	H	R	R	S
<u>PVH51</u>	Medium	not rated	Excellent	L	M	R	R	S
<u>RG 17</u>	Medium/Late	Exc/Good	Exc/Good	L	H	R	S	S
<u>RG 81</u>	Medium/Late	Good	Exc/Good	M	M	R	S	S
<u>RG H4</u>	Medium/Late	not rated	Exc/Good	M	H	R	R	S
<u>RG H51</u>	Medium/Late	Exc/Good	Excellent	H	M	R	S	S
<u>RS 1410</u>	Medium/Late	Good	not rated	H	M	R	S	S

[Click Here To Email Us](mailto:info@rickardseed.com)

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 800.344.0630 or 859.744.4191 • Fax:859.744.4202





UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

Registration No.: 2,666,400
Mark: "K 326"
Registered: December 24, 2002

CROSS CREEK SEED, INC.

and

COATING SUPPLY, INC.,

Petitioners,

v.

F.W. RICKARD SEEDS, INC.,

Respondent.

Cancellation No. 92041792
**DECLARATION OF SAM C.
BAKER**

I, Sam C. Baker, declare that:

1. My name is Sam C. Baker. I am a resident of the State of North Carolina. This declaration is made upon personal knowledge of the facts stated herein.

2. I am an employee of Cross Creek Seed, Inc. ("Cross Creek") and assist my parents, Eddie Baker and Marianne Baker, with the day to day operations of Cross Creek.

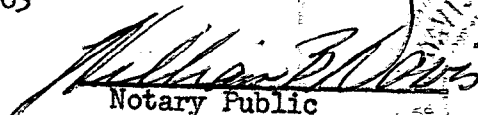
3. On or around December 1, 2002 I was a "carbon copy" recipient of a November 25, 2002 letter from Harold W. Laswell of the United States Department of Agriculture ("USDA") to Marion Hawkins of Gold Leaf Seed Company. A copy of this November 25, 2002 letter is attached as Appendix A to this affidavit.

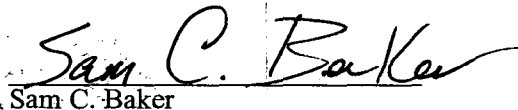
4. At the bottom of page 2 of the November 25, 2002 letter, is a "carbon copy list" of individuals who were "carbon copied" on Mr. Laswell's letter in addition to myself. These individuals are E. Martin of the N.C Department of Agriculture and Consumer Services and James Head of F.W. Rickard Seeds, Inc. (the Respondent in the present action).

I declare under penalty of perjury that the statements in this declaration are true and correct.

This the 23 day of May, 2003.

Signed before me this the 23rd day
of May, 2003


Notary Public


Sam C. Baker

My commission expires 4/16/06



United States
Department of
Agriculture

Agricultural
Marketing
Service

Livestock
and Seed
Program

Seed Regulatory and Testing Branch
Room 209, Building 306, BARC-East
Beltsville, MD 20705-2325
301-504-9430; FAX 301-504-8098

WARNING—APPARENT VIOLATION OF THE FEDERAL SEED ACT

NOV 25 2002

In reply refer to:
FSA 03-0013

Marion Hawkins
Gold Leaf Seed Company
900 South Fourth Street
Hartsville, South Carolina 29550

Dear Mr. Hawkins:

We have information that in the year 2002, Gold Leaf Seed Company distributed or caused to be distributed advertising materials ("Top Growers Use The World's Best Varieties," brochure) by the U.S. mails and electronic transmission (the internet). This brochure indicates that the 'K326' variety of tobacco seed is protected under the Plant Variety Protection Act and Title V of the Federal Seed Act (FSA), and the variety name is a trademarked (™) term, therefore, its "use is strictly prohibited without expressed written permission."

We have information that Plant Variety Protection (PVP) Certificate No. 8300070, issued for K326 tobacco seed, expired on March 26, 2002. It is a violation of sections 201(d) and 501 of the FSA and section 201.36b of the FSA regulations once the certificate of plant variety protection has expired to advertise or label K326 tobacco seed as being "a protected variety having protection under the PVP Act." It is also a violation under Title V of the FSA once the certificate of plant variety protection has expired to specify that K326 tobacco seed is required to be sold by variety name only as a class of certified seed.

The variety name given to the K326 tobacco variety was designated in the application for a PVP Certificate by the originator, Novartis Seeds, Inc. The variety name of this seed when introduced into channels of commerce was K326. Section 201.34(d)(4) of the FSA regulations specifies that the status of a variety name is not modified by the registration of the name as a trademark. It is a violation of section 201(d) of the FSA for the Gold Leaf Seed Company, or any company, to now label and advertise that using "K326" as a tobacco variety name is strictly prohibited without expressed written permission from Gold Leaf Seed Company. It is required under section 201.34(d) of the FSA regulations that the name given by the originator shall be used when seed of that variety is labeled as to variety or the seed is advertised by variety name. Once a variety name has been used in channels of commerce it becomes public property and trademarking any part of the terms used in a variety name does not modify this requirement.

The brochure states that seed of 'RG 17,' 'NC 72,' and 'NC 100' tobacco varieties have been granted protection under the PVP Act, or protection has been applied for. It further states that each variety must be sold by variety name as required under Title V of the FSA. We have information that no application has been made to the PVP Office for the RG 17 and NC 100 varieties. Title V applies only after the PVP certificate has been issued, therefore, it appears that the RG 17 and NC 100 varieties were falsely advertised as having been issued PVP certificates and being protected under Title V of the FSA, in violation of section 201(d) of the FSA. We have information that there is a PVP application pending for NC 72, however, the request for Title V protection under the FSA was not made in the application, therefore, NC 72 was falsely advertised as being protected under Title V of the FSA.

The brochure states that 'RG H4,' 'RG H51,' 'NC 71,' 'Oxford 207,' 'RG 81,' and 'CU263' tobacco varieties are protected under Title V of the FSA. Applications are presently pending for each of these varieties and the Title V option has been requested, however, to date no PVP certificates for these have been issued. Title V applies only after the PVP certificate has been issued, therefore, the above listed varieties were falsely advertised as being protected under Title V of the FSA, in violation of section 201(d) of the FSA.

The brochure also indicates that other tobacco variety names: 'Coker 371 Gold,' 'K 394,' 'K 730,' 'K346,' and 'K358' are trademarked. As explained above, variety names become public property when the variety is introduced into channels of commerce and trademarking the terms in a variety name does not modify the required use of that name by any person selling or advertising the variety.

The Federal Seed Act and its Regulations are available on our home page:
<http://www.ams.usda.gov/lsg/seed.htm>.

This warning is issued under Section 412 of the Federal Seed Act, which provides that in certain circumstances a suitable warning may be issued instead of other action. This warning completes the Federal regulatory action on these violations; your company should make any necessary procedural corrections to prevent future violations.

Sincerely,

Harold W. Laswell
Seed Marketing Specialist

cc: E. Martin (NC Department of Agriculture and Consumer Services)
James Head (F.W. Rickard Seeds, Inc.)
Sam C. Baker (Cross Creek Seed Company)